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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID McCAMMON,

Defendant and Appellant.

B292305

(Los Angeles County
Super. Ct. No. LA086451)

THE COURT:*

David McCammon seeks to undo his plea of no contest but did not obtain a certificate of probable cause from the trial court. His appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 identifying no issue. We affirm.

* LUI, P.J., ASHMANN-GERST, J., CHAVEZ, J.

BACKGROUND

On January 12, 2018, David McCammon entered his plea of no contest to the charge of pandering by procuring. (Pen. Code,¹ § 266i, subd. (a)(1).) As part of the plea defendant agreed to a three-year sentence to run concurrently with the probation violations in Los Angeles Superior Court case Nos. LA081581 and LA082188.

On January 26, 2018, defendant advised the trial court that he wished to withdraw his no contest plea. Counsel advised the court that he would be filing a motion based on new developments involving the alleged victim. The matter was continued for probation and sentencing.

At probation and sentencing proceedings on March 13, 2018, defendant formally moved to withdraw his plea. No written motion was filed, but defendant's attorney, George Mgdesyan, stated that his associate, who had appeared at the plea hearing with defendant, was inexperienced and "didn't know some of the answers" to defendant's questions. As a result, those questions went unanswered, and defendant felt pressured to enter the plea.² Specifically, Mgdesyan explained that defendant's concerns about being on supervised parole after serving his sentence were never addressed.

The trial court responded that defendant would get "a prison sentence served in county jail" followed by nonreporting

¹ Undesignated statutory references are to the Penal Code.

² Counsel also argued that the victim's credibility was an issue because she had reported being pressured by the detective to testify as she had at the preliminary hearing.

parole. Declaring that defendant seemed to be having “buyer’s remorse,” the court explained that at the time of the plea, defendant was facing a maximum term of 3 years 8 months on the probation violation alone, while the People’s offer of three years concurrent would mean he would not be on probation and he would not be subject to any additional time. Noting these benefits, the court added, “And I think he liked that deal at the time.”

After further discussion, the court determined that defendant was required to serve his sentence in state prison,³ but acknowledged, “I don’t think it ever came up when we were taking the plea. I don’t remember it ever coming up.” Counsel again explained that because his associate had been unable to provide answers about county jail versus state prison time, defendant should be allowed to withdraw his plea. The trial court denied the motion to withdraw the no contest plea and sentenced defendant to state prison for the low term of three years on the charge of pandering by procuring. (§ 266i, subd. (a)(1).) The court dismissed the pimping charge (§ 266h, subd. (a)) alleged in count 1 of the information. Probation in the two prior cases was revoked, and the court imposed a three-year sentence for each prior to run concurrently with the current sentence.

On September 25, 2018, this court granted defendant’s application for relief from failure to timely file a request for a certificate of probable cause and notice of appeal. Defendant then

³ The court had previously recognized that a state prison term would be followed by “regular parole,” not the “nonreporting parole” that would follow a county jail sentence.

filed a notice of appeal and a request for a certificate of probable cause on September 28, 2018. In the request for a certificate of probable cause defendant alleged he was under the influence of an unprescribed medication at the time of the plea, which caused him to be “inebriated, confused and not fully aware.” He further alleged that he “did not know all the consequences and terms he was pleading to,” and was falsely led to believe he would not be subject to parole, but to “‘non-reporting probation.’” According to defendant, he pleaded to a burglary he had not been informed was alleged, and the sentence he received “differs greatly from the sentence negotiated.” Finally, defendant averred that his trial counsel had never discussed appeal options with him, failed to file a notice of appeal on his behalf, and had been unresponsive to defendant’s inquiries since the March 13, 2018 sentencing hearing.

The trial court denied the request for a certificate of probable cause on October 3, 2018. Subsequently, this court denied defendant’s petition for a writ of mandate to direct the superior court to grant the certificate of probable cause.

We appointed counsel to represent defendant on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. At the same time, defendant filed a petition for a writ of habeas corpus in case No. B297110.

DISCUSSION

Defendant’s Appeal Is Not Cognizable Without a Certificate of Probable Cause

Section 1237.5 “provides broadly that ‘[n]o *appeal* shall be taken by the defendant from a judgment of conviction upon a plea of guilty or *nolo contendere* . . .’ in the absence of a certificate of probable cause.” (*People v. Johnson* (2009) 47 Cal.4th 668, 676,

681 (*Johnson*); *People v. Thurman* (2007) 157 Cal.App.4th 36, 41 [“A certificate of probable cause is a condition precedent to any appeal within its scope, and the defendant must comply with all statutory requirements”]; § 1237.5; Cal. Rules of Court, rule 8.304(b)(4).) The sole exception to the certificate requirement is this: a “defendant may take an appeal without . . . a certificate of probable cause if he does so solely on noncertificate grounds, which go to *postplea matters not challenging his plea’s validity* and/or matters involving a search or seizure whose lawfulness was contested pursuant to section 1538.5.” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096, italics added.)

Our “Supreme Court has ‘held that section 1237.5 does not apply where a defendant does not challenge the original validity of the plea but asserts that errors were committed in proceedings subsequent to the plea for the purpose of determining the penalty to be imposed.’ ” (*People v. Sem* (2014) 229 Cal.App.4th 1176, 1187, quoting *People v. Kaanehe* (1977) 19 Cal.3d 1, 8.) Nevertheless, “[a] certificate is required for some sentencing challenges” (*Sem*, at p. 1187; *Johnson, supra*, 47 Cal.4th at p. 678), and “[a] defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea” (*Johnson*, at p. 679; *In re Chavez* (2003) 30 Cal.4th 643, 651 [“a defendant who has filed a motion to withdraw a guilty plea that has been denied by the trial court still must secure a certificate of probable cause in order to challenge on appeal the validity of the guilty plea”]). This prerequisite to appellate review applies even where the defendant claims that trial counsel was ineffective in advising him or her to enter a plea. (*Sem*, at p. 1188; *Johnson*, at p. 683 [certificate

required to assert that trial counsel was ineffective in moving to withdraw guilty plea].)

Here, the trial court denied defendant's request for a certificate of probable cause, and we denied defendant's petition for a writ of mandate. The absence of a certificate of probable cause is fatal to defendant's appeal. Accordingly, based on our examination of the entire record, we are satisfied that defendant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The judgment is affirmed.

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